UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

TIMOTHY GALLANT,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 98-407-P-H***
	)	
KENNETH S. APFEL,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Supplemental Security Income ("SSI") and Social Security Disability ("SSD") appeal raises the questions whether the commissioner's decision is supported by substantial evidence and whether it properly rejected the opinion of the plaintiff's treating physician. I recommend that the court remand the case for further proceedings.

In accordance with the commissioner's sequential review process, 20 C.F.R. §§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs*., 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff met the disability insured status

[1] This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on May 7, 1999 pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

requirements of the Social Security Act on November 6, 1992, the date upon which he stated that he became unable to work, and that he continued to meet those requirements through December 31, 1997, Finding 1, Record p. 22; that the plaintiff had not engaged in substantial gainful activity since November 6, 1992, Finding 2, Record p. 22; that the plaintiff's statements were not entirely credible in light of the objective medical evidence and other evidence in the file, Finding 3, Record p. 22; that the plaintiff suffered from acute low back strain, sciatica and chronic pain in his lower back, right leg and neck, impairments that were severe but, either alone or in any combination, did not meet or equal the criteria of any of the impairments listed in Appendix I to Subpart P, 20 C.F.R. § 404, Finding 4, Record p. 22; that the plaintiff retained the residual physical functional capacity to perform the demands of work with the following limitations and restrictions: lift and carry ten pounds frequently and twenty pounds occasionally, sit for eight hours in a workday, with a sit/stand option, walk four out of eight hours in a workday, stand two hours out of eight in a workday with a break after one hour, no repetitive bending, no work in an area of unprotected heights, and no driving, Finding 5, Record p. 22; that the plaintiff was capable of performing his past relevant work as an attendant in a detoxification unit, Finding 7, Record p. 22; and accordingly that the plaintiff was not disabled during the relevant period, Finding 8, Record p. 22. The Appeals Council declined to review the decision, Record pp. 6-7, making it the final decision of the commissioner, 20 C.F.R. § § 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Servs*., 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs*., 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must

be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

Discussion

The plaintiff's challenges to the commissioner's decision arise at Step 4 of the sequential evaluation process, where the commissioner found that the plaintiff could return to his past relevant work as a detoxification attendant. At this level, the burden is on the plaintiff to make a reasonable threshold showing that he cannot return to his former employment because of his alleged disability. *Santiago v. Secretary of Health & Human Servs.*, 944 F.2d 1, 5 (1st Cir. 1991). This includes a showing that he cannot perform his former type of work, as well as the particular work that he did. *Pineault v. Secretary of Health & Human Servs.*, 848 F.2d 9, 10 (1st Cir. 1988). After that threshold is passed, the administrative law judge must measure the requirements of the former work against the plaintiff's capabilities. *Santiago*, 944 F.2d at 5.

A. Dr. Wansker's Report

The plaintiff first contends that the administrative law judge was required to adopt the residual functional capacity determined by his treating physician, Dr. Wansker and, in the alternative, made a fatal error by failing to set forth the reasons why Dr. Wansker's finding was rejected or by failing to contact Dr. Wansker for clarification of her opinion. Itemized Statement of Errors, etc. (Docket No. 3) at 2-4. The plaintiff describes Dr. Wansker's evaluation of his residual functional capacity as follows:

> [T]he Plaintiff can sit for only one hour consecutively; can walk two hours

> out of an eight hour workday, and one hour continuously; can lift up to 20 pounds occasionally but can do no lifting frequently; can do no pushing and pulling; can do no stooping, squatting, climbing, crouching and kneeling; and can do only occasional reaching above shoulder level.

Id. at 2 (citing Record pp. 274-76). The plaintiff contends that this opinion is "entitled to controlling weight under 20 C.F.R. § 404.1527(d)(2)." *Id*. at 2-3.

Actually, the regulation upon which the plaintiff relies provides as follows:

> Generally, we give more weight to opinions from your treating sources, since these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of your medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations, such as consultative examinations or brief hospitalizations. If we find that a treating source's opinion on the issue(s) of the nature and severity of your impairment(s) is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in your case record, we will give it controlling weight. When we do not give the treating source's opinion controlling weight, we apply the factors listed below, as well as the factors in paragraphs (d)(3) through (5) of this section in determining the weight to give the opinion. We will always give good reasons in our notice of determination or decision for the weight we give your treating source's opinion.

20 C.F.R. § 404.1527(d)(2). The giving of controlling weight to a treating professional's opinion is only required under this regulation when that opinion is well-supported by objective testing and is not inconsistent with other evidence in the record. *See Keating v. Secretary of Health & Human Servs*., 848 F.2d 271, 275-76 (1st Cir. 1988) (treating physician's conclusion may be rejected when contradictory medical evidence appears in record). In addition, controlling weight is never given to a treating source's opinion on issues reserved to the commissioner, one of which is the claimant's residual functional capacity. Social Security Ruling ("SSR") 96-5p, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 (Supp. 1997) at 108, 110-11. Further, the weight

given a treating physician's opinion is limited if the opinion consists only of conclusory statements. *Chamberlain v. Shalala*, 47 F.3d 1489, 1494 (8th Cir. 1995).

Here, the only portions of the data recorded by Dr. Wansker on the form upon which the plaintiff relies that are inconsistent with the findings of the administrative law judge are Dr. Wansker's findings that the plaintiff can walk two hours per workday (while the administrative law judge found that he can walk four hours per workday) and the plaintiff is limited to lifting 10 or 20 pounds occasionally (while the administrative law judge found that he can lift 10 pounds frequently and 20 pounds occasionally). The administrative law judge's opinion does mention these findings by Dr. Wansker. Record p. 21. The reports of the consulting physicians support the administrative law judge's findings on these two points. *Id.* at 150, 156 (report of medical consultant Charles E. Burden), 158, 164 (report of Lawrence P. Johnson, M.D.). The administrative law judge also stated that "the objective medical evidence, including the records of his treating physician, Dr. Wansker, are not supportive of the intensity, persistence, and limiting effects of the pain and limiting effects that [the plaintiff] testified to." *Id*. at 20. Dr. Peter K. Esponnette, who examined the plaintiff on November 25, 1996, *id*. at 205, and whose report is also cited by the administrative law judge, *id*. at 19, agreed with the physical limitations then imposed on the plaintiff by Dr. Wansker, *id.* at 209, which allowed lifting up to 20 pounds and did not mention any limit on walking, *id.* at 260. Dr. Wansker does not state in her report dated September 16, 1997, upon which the plaintiff relies here, why she imposed a two-hour limit on his walking during a workday a year after she had imposed none. *Id*. at 274-76.

The failure of the administrative law judge to specify her reasons for rejecting Dr. Wansker's two-hour walking limitation in favor of a four-hour limitation and her restriction on the plaintiff's

ability to lift 10 pounds to an occasional rather than a frequent basis is troubling. *See, e.g., Allen v. Bowen*, 881 F.2d 37, 41 (3d Cir. 1989) (where report of treating physician conflicts with report of consulting physician, administrative law judge must explain reasons for rejecting opinion of treating physician); SSR 96-8p, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 (1997 Supp.) at 131. At oral argument, counsel for the commissioner contended that, because the administrative law judge did expressly give evidentiary weight to the opinions of the state agency evaluators, whose reports indicate that *they* considered and rejected the treating physician's conclusions concerning the plaintiff's limitations, the court could conclude, apparently by inference, that the commissioner's decision complies with the Ruling. I cannot read SSR 96-8p so broadly, particularly where, as here, the state agency evaluator's opinions are not expressly adopted by the decision.

Accordingly, I conclude that the failure of the administrative law judge to specifically state her reasons for rejecting Dr. Wansker's two-hour walking limitation and limitation of lifting 10 pounds to "occasional" rather than "frequent" violates the commissioner's procedural requirements, thereby requiring remand.

B. The RFC Finding

The plaintiff next contends that the administrative law judge's finding of residual functional capacity ("RFC") is not based on the findings of the state agency, nor on the "input of a medical expert," and that it is internally inconsistent. Itemized Statement of Errors at 5. The alleged inconsistency is identified as the findings that the plaintiff can stand for only two hours in a workday and walk for four hours. *Id*. These findings are not inconsistent. The plaintiff himself cites SSR

96-8p, which includes among its illustrations the following example: "the individual can walk for 5 out of 8 hours and stand for 6 out of 8 hours." SSR 96-8p at 129. Walking and standing are not the same physical function and are not mutually exclusive in this context.

The administrative law judge's conclusions regarding the plaintiff's limitations on each of the strength demands that make up exertional capacity, *see id*., with one possible exception discussed below, do in fact find support in the medical reports in the record, some in the reports of the various treating physicians and some in the reports of the consulting physicians. If the plaintiff means to argue that the commissioner may only rely on the report of a particular treating physician to the exclusion of other treating or consulting physicians, he is in error, as previously noted. If he means to argue that the administrative law judge was required to have a medical advisor present at the hearing, he is mistaken on this point as well. *Rodriguez Pagan*, 819 F.2d at 4.

The one possible exception among the plaintiff's limitations is the four-hours-per-workday limit on walking adopted by the administrative law judge. The plaintiff contends that this number "has no basis anywhere in the record" and speculates that the administrative law judge chose it because the plaintiff had testified that his past work as a detoxification attendant required three hours of walking per day. Itemized Statement of Errors at 5. The plaintiff urges this court to disregard the findings of the two consulting physicians that he could "stand and/or walk" for six hours in a workday because SSR 96-8p requires that limitations on the ability to walk and on the ability to stand be considered separately. *Id*. n.*. However, the Ruling merely requires that the functions of standing and walking be *considered* separately, which the administrative law judge clearly did in this case, Record pp. 17, 21-22, and specifically anticipates that walking and standing may be combined in the final RFC assessment. SSR 96-8p at 129. In this case, both of the consulting physicians found

in their RFC assessments that the plaintiff could "[s]tand and/or walk (with normal breaks) for a total of . . . about 6 hours in an 8-hour workday." Record pp. 150, 158. The administrative law judge, adopting Dr. Wansker's standing limitation of two hours per workday, simply determined that four hours remained for walking pursuant to the findings of the consulting physicians, whose reports provide sufficient evidence in the record to support this conclusion.

C. Past Relevant Work

The plaintiff next argues that the commissioner's conclusion that he can perform his past relevant work as a detoxification attendant is in error because it fails to mention his testimony that he was required in that work to restrain patients, which he could not do at the time of the hearing. *Id*. at 41-42. Actually, the plaintiff's testimony was that he had to put restraints on patients at times and he could not do that job now because he "wouldn't want to get in a wrestling match with anyone right now." *Id*. at 42. The plaintiff correctly points out that the administrative law judge's decision does not mention this aspect of his past work. *Id*. at 21.

An administrative law judge must make findings of fact as to the physical and mental demands of a claimant's past work. *May v. Bowen*, 663 F. Supp. 388, 390 (D. Me. 1987) (citing SSR 82-62, reprinted in *West's Social Security Reporting Service* Rulings 1975-1982, at 813). Here, the administrative law judge made such findings but the plaintiff contends that they are fatally incomplete because they do not address that portion of his testimony, the only source of information about the work, regarding application of restraints to patients, an activity that must by its nature involve physical exertion. This was a "work demand" which possibly had "a bearing on the medically established limitations." SSR 82-62 at 812. The Ruling requires "a careful appraisal of . . . the individual's statements as to which past work requirements can no longer be met and the

reasons(s) for his or her inability to meet those requirements." *Id*. at 811. The Ruling also notes the importance of the decision as to whether the claimant retains the residual functional capacity to perform past relevant work and requires that "every effort must be made to secure evidence that resolves the issue as clearly and explicitly as circumstances permit." *Id*. at 812. In this case, such evidence was available, but the administrative law judge's decision ignores it. "The explanation of the decision must describe the weight attributed to the pertinent medical and nonmedical factors in the case and reconcile any significant inconsistencies." *Id*. at 813. An administrative law judge's decision cannot comply with this regulation if it omits any mention of a work activity requiring significant physical exertion that is part of the claimant's past relevant work. *See Schroeter v. Sullivan*, 977 F.2d 391, 394-95 (7th Cir. 1992).

The plaintiff is entitled to a remand for consideration of this issue by the commissioner.

D. Pain

The plaintiff also contends that the administrative law judge erred in finding his testimony concerning pain to be "not entirely credible," Record p. 22, and urges remand on this basis as well. The plaintiff offers no suggestion as to how the alleged failure adequately to evaluate his limitations from pain would affect the commissioner's findings in this regard. If he means to contend that he has no ability to work due to the pain he describes in his testimony, that contention is belied by Dr. Wansker's conclusion that he has the capacity to work a full eight-hour day. *Id*. at 274. The finding that the plaintiff's testimony concerning his pain is not entirely credible is supported in the administrative law judge's decision in an acceptable manner. *Frustaglia v. Secretary of Health & Human Servs*., 829 F.2d 192, 194-95 (1st Cir. 1987); SSR 96-7p, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 (Supp. 1997) at 117-18.

Conclusion

For the foregoing reasons, I recommend that the commissioner's decision be **VACATED** and the cause **REMANDED** for further proceedings consistent herewith.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 12th day of May, 1999.

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David M. Cohen
United States Magistrate Judge